Filed 11/14/03 P. v. James CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL TAVARIS JAMES et al., Defendants and Appellants.	F040735 (Super. Ct. No. SC083736) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant Michael Tavaris James.

Patricia L. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant Manuel Eugene Shotwell.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Matthew L. Cate and John A. Thawley, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

An information filed in Kern Superior Court on March 4, 2002, charged appellants Manuel Eugene Shotwell (Shotwell) and Michael Tavaris James (James) (collectively appellants), with conspiracy to commit murder (Pen. Code, §§ 182, subd. (a)(1), 187, subd. (a)) (count 1), and with attempted premeditated murder (§§ 664, 187, subd. (a)) (count 2). Fourteen overt acts were alleged in connection with count 1. By the time of trial, overt acts 1, 2, 12, 13 and 14 had been stricken or dismissed, and only overt acts 3 through 11 were presented to the jury. The information further alleged, as to both counts, that the crimes were committed with premeditation and deliberation (§§ 664, subd. (a), 189), that appellants had committed the crimes for the benefit of a street gang (§ 186.22, subd. (b)(1)), and that appellants had caused great bodily injury by personally discharging a firearm (§ 12022.53, subd. (d)). As to James, the information alleged a prior prison term enhancement (§ 667.5, subd. (b)).

On May 2, 2002, a jury sworn on April 30, 2002, convicted appellants of both counts and found true the allegation that the crimes were committed with premeditation and deliberation. The jury also found true as to both appellants that a conspirator had committed an overt act in furtherance of the conspiracy charged in count 1 as alleged in the information. The jury further found the personal firearm use enhancement against Shotwell true, but found the street gang allegations against appellants not true. The following day, in a bifurcated court trial, the court found the prior prison term enhancement allegation against James true, granted the prosecutor's motion to strike the personal use of a firearm enhancement alleged against James, and denied James's *Marsden*[1] motion.

James was sentenced on May 29, 2002, to 25 years to life for his conviction in count 1, plus one year for the prior prison term enhancement, and 15 years to life for his

[1] *People v. Marsden* (1970) 2 Cal.3d 118.

conviction in count 2, plus one year for the prior prison term enhancement. The term in count 2 was stayed pursuant to Penal Code section 654.

Shotwell was sentenced on June 11, 2002, in count 1 to 25 years to life, plus 25 years to life on the firearm enhancement, and in count 2 to 15 years to life, plus 25 years to life on the firearm enhancement. The term in count 2 was stayed pursuant to Penal Code section 654.

James and Shotwell appeal. Both James and Shotwell contend that: (1) the trial court failed to properly instruct the jury on the overt act requirement in instructions defining the offense of conspiracy to commit murder; (2) their attempted murder convictions must be dismissed because, as pleaded in this case, attempted murder was a lesser included offense of conspiracy to commit murder; (3) the trial court erred in instructing the jury pursuant to CALJIC No. 17.41.1; and (4) the trial court erred when it sentenced appellants to 15 years to life on count 2. James also contends that: (1) the trial court improperly denied his *Marsden* motion; and (2) the trial court erred when it imposed his single prior prison conviction enhancement on each count of conviction.

For the reasons discussed in this opinion, we find that any instructional error regarding the law of conspiracy was harmless, that reversal is not required because the court instructed the jury pursuant to CALJIC No. 17.41.1, and appellants were properly convicted of both attempted murder and conspiracy to commit murder. Respondent concedes the trial court erred in imposing the prior prison term enhancement on each count of James's conviction and in sentencing both James and Shotwell to 15 years to life on the attempted murder convictions. We agree, and also conclude the trial court erred in failing to allow James to fully state his reasons for requesting substitution of counsel.

FACTS

THE NOVEMBER 27, 2001, WELCH HOMICIDE

Francisco King was a childhood friend of Shotwell and Tommy Welch. King also knew James because they went to high school together. On November 27, 2001, King,

Welch, and Shotwell took Welch's white car to an address on Houser Street in Bakersfield for repairs. After dropping the car off, the three men went to King's house, also on Houser Street. King's girlfriend and daughter were at the house, but King did not recall if James was present. Shortly after arriving at King's house, Welch left. King then heard six or seven shots and "hit the ground." When he got up, he went outside with Shotwell and saw Welch lying in the street. King saw someone running down the alley, but could not identify the person. King went back into the house, got some blankets, and went back outside to help Welch. Shotwell was crying.

Just after 4:00 p.m. on November 27, 2001, Bakersfield Police Detective Dennis McBride and his partner were on patrol when they heard the call about the Welch shooting. They immediately went to the scene. McBride interviewed witnesses and came to believe that Donmac Roberts was the person who shot Welch. McBride also saw a car, which registration records showed was a 1986 Ford registered to Welch, parked in J. T. Grandson's front yard.

Several times on November 27, the police came to Christopher Davis's house and asked him about Donmac Roberts, who was a suspect in Welch's murder. At the time, Davis lived with his brother, William Watson, and his mother. Roberts, who Davis's grandmother had adopted and Davis considered to be his adopted brother, had lived at Davis's house until he got married in 2000. Davis called Roberts his "little brother." After that, Roberts only stayed there occasionally, in the den, when he had marital problems. Davis's mother's bedroom was at the back of the house, while the bedrooms of Davis and Watson were near the front door. In addition to the front door, the den had a sliding glass door that opened to the outside.

Davis testified he told police that on November 27, Roberts had been at his house with him and a friend, playing video games and listening to music, until about 4:00 p.m., when Roberts walked north on a nearby side street. Davis later found out that Roberts had been arrested that day.

THE NOVEMBER 29, 2001, DAVIS SHOOTING

At 8:15 a.m. on November 29, 2001, Davis was lying in bed when he heard someone knocking on his window, banging on the front door, and calling his first name. When Davis yelled, "[W]ho is it?," someone said "it's Eddie L's." Davis knew someone with that nickname, so he looked out his window and saw James, who went by the nickname "Michael Do," and another person, whom he later realized was Shotwell. James was facing Davis's window and wearing a Cowboys jacket with the hood up, while Shotwell was knocking on the door and wearing all black with a coat.

Davis first met James a couple years before, when James came to Davis's house to get car parts from Roberts's car. Since that time, Davis saw James periodically on the street, but they never talked. Davis went to school with Shotwell's brother and knew Shotwell from playing basketball at the park. Davis last saw Shotwell in the summer of 2001. Davis did not have problems with either James or Shotwell before; he didn't really know James and knew Shotwell "quite a bit" from playing basketball and "knowing" Shotwell's brother. According to Davis, Shotwell and Roberts were friends.

Davis thought they might want to ask him about the Welch murder and his brother, so he told them to wait, and he went to the front door. When Davis opened the front door, no one was there. Davis walked outside, turned to his right, and walked to the end of the porch toward the side yard. When Davis got to the end of the porch he saw James and Shotwell. Davis thought they were talking to his brother Watson across the gate or fence. Appellants smiled, and said, "[W]hat's up, Chris?" He replied, "[W]hat's up?" Suddenly a mean look came across Shotwell's face; he raised a gun that he was holding at his side, aimed it at Davis's face, and started shooting. A bullet hit the right side of Davis's neck, and he went into a state of shock. As Shotwell continued shooting, Davis turned and went into the house "in a trance." Davis was shot about eight times, including in the right shoulder and the right side of his chest.

As Davis re-entered his house and closed the door, he saw a hand with a gun following him into the house. Davis continued to close the door, and the hand moved back out of the house. Davis shut and locked the door. Watson walked in from the den, calling 911. At trial, the tape of Watson's 911 call was played for the jury. When the police arrived, Davis talked to an officer and told him who shot him.

About 8:00 a.m. on November 29, Maria Flores returned to her house on the same street as Davis's after dropping her children off at school. About 15 minutes later she heard five shots and ran to her window. She saw two people wearing black jackets run and get into a large, older white car parked in the alley in front of her house. The car may have had a tan top, and one person may have gotten into the front seat while the other person got into the back seat. The people were too far away for her to tell their gender or race. The car left "real fast." Later, Flores told police what she had seen.

Davis was taken to Kern Medical Center, where he told Bakersfield Police Officer Damon Youngblood that Shotwell was the person who shot him. The audiotape of the interview was played for the jury, on which Davis states that Shotwell was the person who shot him and that "Michael Do" was also there.

Ray Chung, a trauma surgeon at Kern Medical Center, treated Davis on November 29, 2001. Dr. Chung noted Davis had "multiple gunshot wounds" to his body, and they counted "seven wounds to his chest," as well as neck wounds. Davis also had pneumothorax, a potentially life-threatening condition caused when a bullet punctures the lung, which required insertion of a tube into Davis's lung. "After adequate resuscitation," they found that Davis had a lot of fluid in his abdomen, and medical personnel rushed Davis into surgery. During surgery, Dr. Chung repaired two holes in Davis's diaphragm, as well as injuries to his liver and spleen. Any one of the injuries was potentially life-threatening, but Dr. Chung described the pneumothorax as the most dangerous.

THE INVESTIGATION INTO THE DAVIS SHOOTING

During Davis's three-week hospital stay, Detectives Charmley and McBride came and talked to him. The detectives showed him pictures of James and Shotwell, and he identified them as the men who had shot him. At trial, Davis admitted telling the detectives that he initially did not see the second person when he first looked out the window, but explained that he meant that while he saw the second person, he could not identify who the person was. Davis assumed the person was Eddie L. because they called out that name. It wasn't until he came out of the house and saw the second person that Davis realized it was Shotwell, not Eddie L. Davis also denied telling the detectives that he thought something was wrong before he went to the door, and if he did not answer the door, appellants would have kicked it in. At the time of trial, Davis still had bullets and bullet fragments inside him.

At about 5:50 p.m. on January 4, 2002, Las Vegas Metropolitan Police Officer Edward Reese was on duty when he stopped a white Ford LTD driven by James, with Shotwell as a passenger. The car was listed as a "felony vehicle" from Bakersfield for murder, with a Bakersfield police department telephone number. Appellants told Officer Reese that they did not have identification cards, gave him false names, and told conflicting stories about where they had been staying. James could not give the criminal history of the name he had given Officer Reese. Officer Reese eventually learned appellants' true identities by getting additional information from the Bakersfield police, including tattoo descriptions. Based on this information, appellants were taken to jail. While still at the scene of the stop, James admitted he had given a false name. Shotwell admitted he gave a false name after being booked into jail.

In January 2002, McBride and his partner drove to Las Vegas to interview appellants, and to look at the car that had been impounded. McBride recognized the car as the white one he had seen in J. T. Grandson's front yard that belonged to Welch.

Also in January 2002, McBride interviewed King at the Kern County jail. King told McBride that on November 27, 2001, he, his girlfriend or wife, their child, Welch, and James took Welch's car to J. T. Grandson's house for repairs. King said that as they were crossing the street to return to his house, he saw a green van drive by with someone in it that he knew, and he was irritated that they did not stop to acknowledge him and his friends. After the van drove by, they went inside King's house. Shortly after Welch went outside to ride a skateboard, they heard gunshots. King told McBride that James covered King's child either while shots were being fired, or shortly thereafter. King also said that he and Shotwell then went outside.

At trial, King did not recall telling Detective McBride that James was with the group of people present at his house on November 27, 2001, and he denied telling McBride that James got on top of his daughter when the shots that killed Welch were fired, a green van drove by, or that he and Shotwell chased a green van in his girlfriend's car but were unable to catch it.

SHOTWELL'S DEFENSE

Shotwell testified in his own defense. In December 2000 he was walking out of a house when "some guys ran out of a [*sic*] alley and just started shooting." He sustained three gunshot wounds—two to his right leg and one across his left toes. Since the shooting, he always walks with a limp and uses a cane, and he has been unable to run, jump or play basketball. Shotwell admitted that in March 2001 he was arrested for and entered a plea to evading a police officer. He served a sentence in jail, and was released on August 17, 2001. He received medical treatment for his gunshot wounds for months, including plastic surgery while he was in jail. He showed the jury the scars from his wounds, including the places where two bullets remained in his leg.

Shotwell admitted he had known Davis for about 10 years, but denied staying at Davis's house or playing basketball with him. Shotwell testified that he was not friends

with Davis, but he didn't "have anything against him." Shotwell testified he knew Roberts, who was his friend.

Shotwell moved to Fresno in August 2001, where he lived with his girlfriend, Tonoma French. Shotwell was visiting Bakersfield for a Thanksgiving vacation at the time of the Welch shooting. He admitted that on November 27, 2001, he was with King and Welch during and after the time he left his car, a white 1986 Ford Crown Victoria, at J. T. Grandson's house to be repaired. The car was registered to Welch, who was Shotwell's nephew, but Shotwell claimed he owned the car. Shotwell testified he dropped the car off sometime between 2:00 and 4:00 p.m.

While the group was walking to King's house, King pointed out a green van that drove by, but Shotwell testified he did not see who was in the van. Shotwell was in King's house when he heard the shots that killed Welch, but he did not see the shooting. He initially ducked down in the house, but then went out on the porch and saw a person running and Welch lying on the street. Shotwell could not identify the person running away, but had heard rumors regarding who killed Welch. Shotwell was upset over the shooting. Shotwell testified King took a blanket to Welch, and denied the fleeing person got into a green van, or that he and King chased the van. Shotwell testified he had not seen Roberts recently, and was not aware of any problems between Welch and Roberts.

Shotwell testified that about an hour after the shooting, a friend named Shanetha, who came to the scene shortly after the shooting, took him to his parents' house in Bakersfield, and he told them their grandson had been killed. Shotwell picked up his car at about 6:00 p.m., after the police had left the scene, paid Grandson for the repair, and drove back to his home in Fresno. According to Shotwell, he did not come back to Bakersfield on November 29, 2001, nor did he participate in the Davis shooting.

Shotwell admitted he went to Las Vegas in December for a vacation, where he stayed at the house of his girlfriend, Denise, for a couple weeks. He testified he ran into James at the house of a mutual friend in Las Vegas only a few days before they were

arrested. Shotwell claimed the last time he had seen James in Bakersfield was when they were incarcerated together in 2001. Shotwell testified he gave police a false name because he had a probation condition that he remain in California, and he also had outstanding warrants for restitution and traffic violations.

JAMES'S DEFENSE

James testified in his own defense. He told the jury his nickname is "Michael Do." James testified he knew Roberts, but he did not know Davis. James testified that he had never been to Davis's house, he never got car parts at Davis's house from a car belonging to Roberts, he was not involved in the shooting of Davis, and he was not in Bakersfield the day Davis was shot. James denied being present when Welch was shot.

James testified he was shot in the calf while running an errand for his girlfriend's father around September 22, 2001. According to James, the wound did not require medical attention, he did not know who shot him, and he did not report it to police. His girlfriend got scared, so he flew from Bakersfield to Tampa, Florida on October 3, 2001. James stayed in Tampa until November 11, 2001, when he went to Los Angeles, where he lived with Felicia Thompson. James testified that Thompson drove him to Bakersfield on November 19, 2001, so he could celebrate his birthday with his girlfriend. He was in Bakersfield for about 10 hours before he and Thompson returned to Los Angeles, where he stayed for another two or three weeks.

James testified he went to Las Vegas on a Greyhound bus in early December. While there, he stayed in a variety of motels. According to James, he was very close to Welch, his cousin, but he only found out that Welch had been shot when he called his aunt on Christmas Day to wish her a "[M]erry Christmas." James insisted he ran into Shotwell in Las Vegas at the house of a mutual friend right before New Years, and the last time he saw Shotwell was when they were incarcerated together in March 2001 at the Kern County jail. James testified Shotwell is his cousin, and that he knew Shotwell "pretty good." James admitted he was driving when he and Shotwell were stopped by the

police in Las Vegas, and he claimed he gave the officer a false name because he did not have a driver's license.

REBUTTAL

Detective McBride left the scene of the Welch shooting between 6:00 p.m. and 7:00 p.m. When he left, lab personnel were still on the scene, finishing their investigation. On January 5, 2002, he and Detective Charmley interviewed James and Shotwell in Las Vegas. Detective McBride did not recall Shotwell having the pronounced limp he exhibited at trial. Shotwell told the detectives that he had known Davis for quite some time, and he had lifted weights and played basketball and football with Davis at a park. Shotwell also knew Roberts was the suspect in the Welch shooting, and he told Detective McBride he was in Fresno on November 29, 2001.

DISCUSSION

A. Conspiracy Jury Instructions

Appellants contend that the trial court erred when it instructed the jury that it could consider the agreement to commit murder and fleeing the scene after commission of the target offense as overt acts that would support a verdict finding appellants guilty of the conspiracy charged in count 1. Appellants assert that the conspiracy instructions violated federal due process principles because they misinstructed the jury concerning the overt act element of the charged conspiracy offense.

1. Invited Error or Waiver

Preliminarily, we will address respondent's contention that appellants are precluded from asserting this claim under the doctrines of invited error or waiver. We disagree. "The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." (*People v. Lucero* (2000) 23 Cal.4th 692, 723; see also *People v. Wader* (1993) 5 Cal.4th 610, 657-658.) Here, the record does not show who requested the conspiracy instructions. It shows only that the court reviewed the

instruction with the attorneys in an off-the-record conference, and that appellants did not object to the instructions that were given. We find the record in the instant case does not disclose a level of consciousness and deliberation sufficient to support a conclusion that appellant has waived review of the jury instruction issue (see, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 152; *People v. Cooper* (1991) 53 Cal.3d 771, 831).

Neither does defense counsels' failure to object constitute waiver, since the absence of objection does not preclude appellate review for constitutional error. (Pen. Code, § 1259 ["The appellate court may … review any instruction given … even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140 ["[T]he constitutional right to have all elements of a criminal offense proved beyond a reasonable doubt is substantial"].) We therefore reject respondent's claims of waiver and invited error and proceed to consider the merits of appellants' claim.

2. Trial Proceedings

The jury was fully instructed on the law of criminal conspiracy. It was correctly informed pursuant to CALJIC No. 8.69 that to find appellants guilty of conspiracy to commit murder "in addition to the proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the Information to be overt acts and that the act found to have been committed was an overt act." The term "overt act" was defined as "any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy."

The jury was also properly instructed with CALJIC No. 6.11 that: "Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of

the conspiracy"; and with CALJIC No. 6.12 that: "The formation and existence of a conspiracy may be inferred from all the circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct evidence or by circumstantial evidence or both by both direct and circumstantial evidence. [¶] It is not necessary to show a meeting of the alleged conspirators or the making of an expression or formal agreement"; and with CALJIC No. 6.16 that: "Where a conspirator commits an act or makes a declaration which is neither in furtherance of the object of the conspiracy nor the natural and probable consequence of an attempt to obtain that object, he alone is responsible for and bound by that act or declaration. No criminal responsibility therefore attaches to any of his confederates"; and with CALJIC No. 6.18 that: "Evidence of the commission of an act which furthered the purpose of an alleged conspiracy is not in itself sufficient to prove the person committing the act was a member of the alleged conspiracy"; and with CALJIC No. 6.22 that: "Each defendant in this case is individually entitled to and must receive your determination whether he was a member of an alleged conspiracy. As to each defendant you must determine whether he was a conspirator by deciding whether he willfully, intentionally, and knowingly joined with any others or other in the alleged commission."

However, the jurors were also given the following modified version of CALJIC No. 6.23:

> "In this case the defendants are charged with conspiracy to commit the public crimes of murder in count one. It is alleged in count one that the following acts were committed in this state by one or more of the defendants and were overt acts and committed for the purpose of furthering the object of conspiracy:
>
> "Number three. The defendants and/or … co-conspirators agreed to commit a retaliatory murder against the murderer's family. [¶] Four. The defendants and/or co-conspirators entered Tommy Welch's vehicle. [¶] Five. The defendants and/or co-conspirators parked one-half block away from Christopher Davis' house. [¶] Six. Manuel Shotwell and/or Michael James knocked on the door at 1300 East 18th Street. [¶] Seven. Manuel Shotwell and/or Michael James knocked on the window at 1300

East 18th street. [¶] Eight. Manuel Shotwell and/or Michael James tried to lure Christopher Davis outside by lying to him. [¶] Nine. In order to ambush him, the defendants and/or co-conspirators hid when Christopher Davis came out of his house. [¶] Ten. The defendant Manuel Shotwell shot Christopher Davis in the neck and torso numerous times. [¶] Eleven. The defendants fled the scene and entered Tommy Welch's vehicle.

"The defendants are also charged in count two with the commission of the crime of attempted murder."

During her closing arguments, the prosecutor, in explaining conspiracy to the jury, stated that conspiracy requires that two people "get together and agree at that point they want to commit that crime and they want to intend to be in cahoots together and intend to commit that crime." The prosecutor further explained that "[t]here is also an additional requirement in a conspiracy, that an overt act be committed. What is an overt act? An overt act is an act that was committed to further the object crime." The prosecutor also explained that while the jurors must unanimously agree that an overt act was committed in furtherance of the conspiracy, they did not have to unanimously agree as to which overt act was committed in furtherance of the conspiracy to commit murder.

The verdict form did not require the jury to specify which overt act it found appellants had committed.

3. Conflicting Jury Instructions

Appellants argue that CALJIC No. 6.23, as given, was inconsistent with CALJIC No. 8.69 and improperly led the jury to believe that all 11 of the acts alleged to be overt acts were valid, overt acts upon which the jurors could find appellants guilty of conspiracy to commit murder. Specifically, appellants contend that although the jury was told that an overt act must be a step going beyond the agreement to commit a crime, it was then told that the agreement itself—alleged overt act number three—could be an overt act, and that although the jury was told the act must be done for the purpose of accomplishing the object of the conspiracy, it was then told it could use an act that

occurred after the object was achieved—alleged overt act number eleven—as an overt act.

Implicitly conceding the error, respondent agrees that the overt acts alleged in the information and read to the jury included the agreement itself as well as acts that occurred after the object of the conspiracy was complete. Despite this, respondent argues that, based on the other instructions given, it is not reasonably likely the jury applied the conspiracy instruction regarding overt acts in an unconstitutional manner and, in any event, the error was harmless beyond a reasonable doubt because the jury necessarily found one of the other overt acts to be true.

It is axiomatic that it is error to give conflicting or contradictory instructions on a material point. (*Lewis v. Franklin* (1958) 161 Cal.App.2d 177, 185; *Smith v. Makaroff* (1957) 149 Cal.App.2d 655, 658.) The danger, of course, is that the jury will not know which instruction to follow in arriving at a verdict. (See, e.g., *Hargrave v. Winquist* (1982) 134 Cal.App.3d 916, 924.)

Penal Code section 184 provides that an agreement does not constitute a conspiracy unless it is accompanied by "some act, beside such agreement" to effect the object of the conspiracy by one or more of the parties to the agreement. In addition, "acts committed by conspirators subsequent to the completion of the crime which is the primary object of a conspiracy cannot be deemed to be overt acts in furtherance of that conspiracy." (*People v. Zamora* (1976) 18 Cal.3d 538, 560; see also *People v. Brown* (1991) 226 Cal.App.3d 1361, 1369, disapproved on other grounds in *People v. Russo* (2001) 25 Cal.4th 1124, 1134.)

Proof of commission of an overt act is an essential element of the crime of conspiracy and it must be charged with particularity. (*Feagles v. Superior Court* (1970) 11 Cal.App.3d 735, 739.) As explained in *Brown*:

> "… The great weight of authority holds that in light of the statutory language the elements of a conspiracy are: 1) an agreement to commit a crime, and 2) an overt act done by a member of the conspiracy in

furtherance of the agreement. [Citations.] [Penal Code s]ection 182, subdivision (b) (formerly § 1104) provides that the defendant cannot be convicted unless at least one overt act is alleged and proved by the prosecution.

"The purpose of the overt act requirement is to allow the conspirators the opportunity to reconsider and withdraw their agreement. [Citation.] A further purpose is to prove the existence of the agreement." (*People v. Brown*, *supra*, 226 Cal.App.3d at pp. 1367-1368.)

We agree that CALJIC No. 8.69, as given, conflicted with CALJIC No. 6.23. CALJIC No. 8.69 instructed the jury that an act beyond mere planning or agreement that is done in furtherance of the accomplishment of the object of the conspiracy is required to find appellants guilty of the crime of conspiracy. Neither party disputes the legal correctness of this instruction and neither do we. Yet, reasonable jurors would have concluded from CALJIC No. 6.23 as given that appellants "agreed to commit a retaliatory murder" and "fled the scene and entered Tommy Welch's vehicle" were valid overt acts upon which they could base their verdict on the conspiracy count since it would have been logical for them, absent instruction to the contrary, to assume that their verdict could be based on the overt acts set forth in the information. We therefore agree that the modified version of CALJIC No. 6.23 given here which specifies that appellants "agreed to commit a retaliatory murder" and "fled the scene and entered Tommy Welch's vehicle" as two of the overt acts alleged in the information was misleading and conflicts with CALJIC No. 8.69.

4. Harmless Error

While the instructions as given were erroneous, we nevertheless conclude the error was harmless because the jury necessarily found, under other properly given instructions, that appellants committed an overt act other than the ones erroneously presented. (*People v. Kelly* (1992) 1 Cal.4th 495, 531 [no reversal where reviewing court able to determine that verdict rested on correct theory, rendering erroneous instructions of no consequence]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277 [erroneous instruction

may be cured if essential material is covered by other correct instructions properly given].) The jury found the special allegation of personal use of a firearm true against Shotwell. Under the instruction given on this special allegation, the jury necessarily found that Shotwell "personally discharged a firearm during the commission" of the conspiracy to commit murder alleged in count 1, and that the act "caused great bodily injury to Christopher Davis."

Thus, the jury necessarily concluded that Shotwell shot Davis, and that Davis suffered great bodily injury as a result. Since the jury reached this conclusion with respect to the personal use of a firearm enhancement, the jury must necessarily have also concluded that overt act ten— "Defendant Manuel Shotwell shot Christopher Davis in the neck and torso numerous times"—was true. Put another way, no rational jury could have found this overt act unproven and also find the personal use of a firearm enhancement alleged against Shotwell true. Since all of the jurors necessarily agreed that one of the overt acts other than acts three and eleven was true, the error was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 19-20; accord, *People v. Flood*, *supra*, 18 Cal.4th at p. 506.)

B. Attempted Murder

Appellants contend that because the attempt to commit murder is set forth as an overt act within the conspiracy offense specifically charged in the information, it is a lesser included offense and appellants cannot be convicted of both conspiracy to commit murder and the "necessarily included" offense of attempted murder. We disagree.

Criminal conspiracies are separately punishable based on the theory that "collaborative criminal activities pose a greater potential threat to the public than individual acts." (*People v. Tatman* (1993) 20 Cal.App.4th 1, 8.) "It has long been settled that a conspiracy is a distinct offense from the actual commission of the offense forming the object of the conspiracy and that guilty parties may be legally convicted of both offenses." (*People v. Campbell* (1955) 132 Cal.App.2d 262, 268; see also *People v.*

Cooks (1983) 141 Cal.App.3d 224, 278; *United States v. Felix* (1992) 503 U.S. 378, 389-391.) Although a conspiracy is not punishable unless an overt act is committed, it is the agreement that constitutes the offense. Thus the attempted murder alleged as an overt act is not a necessarily included offense to the crime of conspiracy to commit murder.[2]

C. CALJIC No. 17.41.1

The trial court instructed the jury pursuant to CALJIC No. 17.41.1. Appellants both contend that CALJIC No. 17.41.1 effects a number of constitutional violations. They acknowledge that the issue has been resolved against them by our Supreme Court in *People v. Engelman* (2002) 28 Cal.4th 436, 439-440, which held that the instruction "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict." Nonetheless, they contend that the case was wrongly decided. Appellants must address the issue elsewhere. The holding of our Supreme Court is, of course, binding on this court (*Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

D. The *Marsden* Motion

On May 3, 2002, the day after the jury rendered its verdicts and immediately following a court trial on the issue of James's prior conviction, the court heard and denied James's *Marsden* motion for substitute counsel. James argues the court erred in denying his *Marsden* motion to relieve his counsel on three grounds: (1) the court did not let him fully state his reasons for requesting substitute counsel; (2) the court failed to ask trial counsel about James's allegation that he did not communicate adequately with James and failed to call an essential defense witness; and (3) the court inappropriately relied on its own confidence in James's attorney based on courtroom observation.

---

[2]The cases appellants rely on, *People v. Cook* (2001) 91 Cal.App.4th 910 and *People v. Sanchez* (2001) 24 Cal.4th 983, do not compel a different result because neither discuss whether a defendant may be convicted of both conspiracy to commit a target offense and the target offense.

Respondent contends the court fully performed its duties under *Marsden*, and, even if it did not, any error is harmless. We agree with James that the court erred by not allowing James to fully state his reasons for requesting substitute counsel, and that the error is not harmless.

1. Trial Proceedings

At the conclusion of the May 3 hearing, James's counsel told the court that James "would like to apply to have counsel appointed to investigate what he alleges is my ineffectiveness of counsel in this trial and to make a motion for a new trial based upon my alleged ineffectiveness." The court responded that "without anything further than that, I'm not going to do that." James's counsel asked if James should make a *Marsden* motion. The court responded it could not advise him of that, but that Shotwell, who was represented by the public defender of the year in the State of California, was convicted of everything. James asked if he could fire his attorney. The court responded that he could not, but if he wanted to bring a *Marsden* motion, he should talk to his attorney about it, and took a recess so he could do so.

The court then held a hearing on the *Marsden* motion. The court asked James why he thought his attorney should be relieved and a new one appointed. The following exchange occurred:

> "[JAMES]: Back in the preliminary, before the preliminary—I think at preliminary I tried to have him relieved, and they didn't grant it for grounds of—also just really wasn't—he didn't really help me. You know what I'm saying? [¶] It's like before he we [*sic*] even got to pretrial, I didn't get no police reports. I didn't know what I was in here for. He said assault."

The Court took a short recess. When the proceedings resumed, the court asked James to continue.

> "[JAMES]: Well, when I was first brought in, they gave me a police report, about two pieces of paper, saying something about Francisco King stating I was here or stating that I was at his house and all this—came here and testified I wasn't. I testified I wasn't. That's all I have. [¶] I went to

the preliminary. Pre-preliminary offered me four years. I didn't know what they were offering me time in the first place. [¶] Then went on, went on—keep asking for more. [¶] He gave me another police report just on Tommy Welch, the murder of Tommy Welch. That had nothing to do with my case. That had nothing to do with my name, had my name nowhere. [¶] It was like all the way past pretrial I was in the blind of what the charges really was against me, you know. I kept trying to explain. [¶] You know, I'm—then my witnesses—I had a witness. He told me the witness wasn't no good for me, this and that. [¶] I don't—I just wasn't being helped the way I felt I should have been helped. You know what I'm saying? [¶] I tried to get rid of him one time. They told me—

"THE COURT: I don't know what happened before, but you haven't shown me anything that would cause me to relieve him at this point. [¶] I sat here during the trial. He was prepared. He knew what was going on in the trial, provided a defense. [¶] There was an eyewitness that testified against you, a victim in this incident, and it was just a matter who the jury was going to believe. [¶] All right. The motion to have your attorney relieved is denied. [¶] Thank you."

2. Analysis

A defendant is entitled to competent representation and to appointment of counsel if he is indigent. (*People v. Smith* (1993) 6 Cal.4th 684, 690.) Although the decision whether to permit a defendant to discharge appointed counsel and substitute another attorney is within the discretion of the trial court, and a defendant has no absolute right to more than one appointed attorney, "the trial court cannot thoughtfully exercise its discretion in this matter without listening to [the defendant's] reasons for requesting a change of attorneys." (*People v. Marsden*, *supra*, 2 Cal.3d at p. 123.)

The relevant conduct and events prompting a defendant's request for new counsel may not be apparent to the judge from observations made in the courtroom. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 123.) The critical inquiry ordinarily relates to matters outside the trial record, e.g., whether the defendant had a defense that was not presented, whether counsel adequately investigated the facts, and whether the omissions charged to counsel resulted from inadequate preparation as opposed to a choice of trial tactics and strategy. (*Id.* at pp. 123-124.) "When a defendant moves for substitution of appointed

counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate." (*People v. Webster* (1991) 54 Cal.3d 411, 435.)

A defendant must be given an opportunity to state his reasons for a request for new counsel at any stage of the trial (*People v. Mack* (1995) 38 Cal.App.4th 1484, 1487), including posttrial. (*People v. Smith*, *supra*, 6 Cal.4th at pp. 691-694, 696; *People v. Winbush* (1988) 205 Cal.App.3d 987, 991; *People v. Dennis* (1986) 177 Cal.App.3d 863, 871.) For example, a defendant may desire a new attorney posttrial for the purpose of sentencing or making a motion for new trial. (*People v. Dennis*, *supra*, at p. 871; *People v. Winbush*, *supra*, at p. 991.)

Ineffective assistance of counsel at trial may be argued in a new trial motion. (*People v. Smith*, *supra*, 6 Cal.4th at p. 693.) However, a defendant is not automatically entitled to new counsel when moving for new trial on that ground, even though the original attorney might be placed in an awkward and difficult position in arguing his or her own incompetence at trial. (*Id.* at p. 694.) This is because *Marsden* applies regardless of the stage of the trial:

> "[S]ubstitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel (*People v. Webster*, *supra*, 54 Cal.3d at p. 435), or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result (*People v. Crandell* [(1988)] 46 Cal.3d [833,] 854). This is true *whenever* the motion for substitute counsel is made." (*People v. Smith*, *supra*, 6 Cal.4th at p. 696.)

Thus, a trial court faced with a posttrial motion for new counsel must allow the defendant to express any specific complaints about the attorney. (*Id.* at p. 694.)

James was deprived of a meaningful hearing on his *Marsden* motion. Although the trial court initially allowed James to state his reasons for his request for new counsel,

the trial court improperly cut off his attempt to do so. It appears that James was explaining what he perceived to be a lack of communication with his attorney from when his trial counsel was initially appointed through the preliminary hearing. Since the court cut him off during this explanation, however, we are unable to tell whether James's explanation would have eventually included any complaints about his attorney during the trial. That it appeared to the court that James's counsel performed adequately in the courtroom does not satisfy its obligation to allow James to completely state why he believed his attorney should be replaced, given that his reasons may have been based on events that occurred outside the courtroom.

Denying a motion to substitute counsel without giving the defendant an opportunity to catalogue acts and events beyond the observations of the trial judge deprives the defendant of a fair trial. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 126.) The error is reversible unless the record shows beyond a reasonable doubt that the error did not prejudice the defendant. (*Ibid.*, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Because we do not know what James might have shown had he received a full hearing on his *Marsden* motion, we cannot say the error was harmless.

We will therefore reverse James's judgment and remand to the trial court with directions to conduct a *Marsden* hearing at which James shall have a full opportunity to state his reasons for desiring new counsel. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 579-580; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1666-1667.) In the words of the court in *Kelley*: "Nothing about our conclusion should indicate [James's] motion has merit. After inquiring of [James] and counsel, the court may determine his claims are not credible or counsel's actions were within the acceptable range of attorney conduct and strategy. We rule only that the court must consider the claim and exercise its discretion." (*People v. Kelley*, *supra*, at p. 580.)

Thus, in the exercise of its discretion, the trial court should appoint substitute counsel only if James shows: (1) defense counsel is not providing adequate

representation; or (2) James and his counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Smith*, *supra*, 6 Cal.4th at p. 696.) If after the *Marsden* hearing the trial court determines good cause for the appointment of new counsel has been shown, it shall appoint new counsel and conduct such further proceedings as may be appropriate. If no motion for new trial is made, or a motion for new trial is made but denied, then the trial court shall reinstate the judgment. If no good cause for the appointment of new counsel is established at the *Marsden* hearing, then the trial court shall reinstate the judgment.

E. Sentencing Issues

1. The Sentence for Attempted Murder

Appellants contend that the trial court erred in sentencing them to 15 years to life on count 2—the attempted premeditated murder conviction. Respondent concedes the issue and we agree. "The punishment for attempted premeditated murder is a prison term 'for life with the possibility of parole.' ([Pen. Code,] § 664, subd. (a).)" (*People v. Felix* (2000) 22 Cal.4th 651, 657.) Thus, the court erred in sentencing appellants to 15 years to life on count 2. Accordingly, we will remand appellants' cases for the trial court to correct the abstracts of judgment.

2. James's Prior Prison Term Enhancement

James contends the trial court erred in applying the same prior prison term enhancement twice. The trial court took a single prior prison term enhancement and applied it consecutively to count 1 and then applied it consecutively a second time to count 2. Though the court stayed sentence on the application of the enhancement to count 2, the court applied the same status enhancement twice. As respondent concedes, this was error.

Sentences for prior prison term enhancements do not attach to particular counts but are added just once as the final step in computing the total sentence. (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on other grounds in *People v. Ewoldt* (1994) 7

Cal.4th 380, 386-387, 398-401.) The trial court could not impose a single prior prison term enhancement twice even though the second imposition of the enhancement was imposed concurrently. Accordingly, the abstract of judgment must be corrected.

DISPOSITION

As to appellant Michael James, the judgment is reversed and remanded to the trial court for the limited purpose of holding a hearing on appellant James's *Marsden* motion. If appellant James makes a prima facie showing of ineffective assistance of counsel, the trial court is to appoint new counsel for the purpose of bringing a motion for new trial. If appellant James fails to make a prima facie showing of ineffective assistance of counsel, the trial court is to reinstate the judgment of conviction as to the conspiracy to commit murder and attempted murder counts, with the exception of imposing a single consecutive prior prison term enhancement which is not attached to either count in place of the two prior prison term enhancements currently attached to each count, and to sentence appellant James to life with the possibility of parole on count 2, in place of the current sentence of 15 years to life.

As to appellant Manuel Shotwell, the case is remanded to the trial court to correct the abstract of judgment to replace the 15 years to life sentence on count 2 with a sentence of life with the possibility of parole, and the trial court is to forward the amended abstract of judgment to the Department of Corrections. Shotwell has no right to be present at the proceedings on remand that only modify the judgment or amend the abstract of judgment. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.) In all other respects the judgment is affirmed.

_____

GOMES, J.

WE CONCUR:

_____

WISEMAN, Acting P.J.

_____

LEVY, J.